Supreme Court, U. S.
FILED
JAN 4 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-608

RELIANCE INSURANCE COMPANY,
Petitioner,

vs.

DeBOER CONSTRUCTION, INC., and
THE INSURANCE CENTER, INC.,
Respondents.

REPLY BRIEF OF RESPONDENT DeBOER CONSTRUCTION, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

*LAWRENCE E. CURFMAN
JOHN R. STALLINGS
BRIAN G. GRACE, of
CURFMAN, BRAINERD, HARRIS, BELL, WEIGAND & DEPEW
830 First National Bank Building
Wichita, Kansas 67202
(316) 263-9111

WILLIAM J. ROSS, of
RAINEY, WALLACE, ROSS & COOPER
735 First National Center
Oklahoma City, Oklahoma 73102
(405) 235-1356

Attorneys for Respondent, DeBoer Construction, Inc.

January, 1977

*Counsel upon whom service is to be made

E. L. MUNDENHALL, INC., 936 Cherry Street, Kansas City, Mo. 64106, (816) 421-5030

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-608

RELIANCE INSURANCE COMPANY,
Petitioner,

vs.

DEBOER CONSTRUCTION, INC., and
THE INSURANCE CENTER, INC.,
Respondents.

REPLY BRIEF OF RESPONDENT DeBOER CONSTRUCTION, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Hereinafter the parties are referred to as "Reliance" for petitioner, Reliance Insurance Company; "DeBoer" for respondent, DeBoer Construction, Inc.; and "Insurance Center" for respondent, The Insurance Center, Inc. This Brief is limited to a rebuttal of an argument advanced by Reliance in its REPLY BRIEF which concerns its alternative prayer for the certification of questions of law to the Oklahoma Supreme Court pursuant to the Uniform Certification of Questions of Law Act.

The United States Court of Appeals for the Tenth Circuit based its decision concerning this respondent on two legal doctrines. The first was the partial validity exception doctrine regarding the power of attorney affixed to a performance bond, and the second was the partial performance doctrine which exempted promises by petitioner's agent from the provisions of the Oklahoma Statute of Frauds. Reliance now, and for the first time, asks this Court to certify legal questions to the Oklahoma Supreme Court concerning these doctrines.

Reliance, in its Reply Brief, substantially distorts the history of the litigation in replying to the claim by DeBoer that it is guilty of laches for not requesting certification earlier. Reliance (REPLY BRIEF, p. 6) contends that prior to the Court of Appeals decision it did not know that this case could be decided upon legal doctrines of first impression in Oklahoma. Reliance also contends (REPLY BRIEF, p. 6) that its only remedy after the decision was to petition for rehearing and that prior to its Petition for Certiorari the case was improper for certifying questions of law. Reliance does not dispute the fact that Oklahoma law permitted certification at any stage of the litigation, even before trial. Reliance's arguments leave the reader with the impression that the Court of Appeals decided this case on two obscure and otherwise inconsequential doctrines of which Reliance had no knowledge prior to the decision. This impression is simply not true. A summary of the litigation, chronologically presented hereafter, shows that these doctrines were key issues for years before the Court of Appeals decision. The summary refers to only the most major points in the litigation.

On December 28, 1971, DeBoer moved the trial court for partial summary judgment based upon the partial

validity exception doctrine. Reliance filed its own motion for summary judgment and its brief on May 17, 1972, in which it discussed the partial validity exception doctrine and raised the Statute of Frauds questions. Reliance spent *seven pages* of that brief discussing the partial validity exception doctrine and referred to many of the legal authorities cited herein by it and DeBoer. Reliance's claim that it was surprised that these doctrines were relied upon by the Court of Appeals is ridiculous since it had briefed these doctrines in the trial court more than *four years* before the Court of Appeals decision.

The Uniform Certification of Questions of Law Act was first effective in Oklahoma on *July 1, 1973.* Subsequent to the effective date of the Act, the following major pleadings, briefs and arguments were submitted to the trial court and the Court of Appeals wherein the doctrines noted above were discussed:

1. DeBoer's Trial Brief (January 7, 1974)
2. Reliance's Trial Brief (January 24, 1974)
3. Insurance Center's Trial Brief (January 24, 1974)
4. Trial (March 19 and 20, 1974)
5. DeBoer's Suggested Conclusions of Law (March 11, 1974)
6. Reliance's Suggested Conclusions of Law (April 12, 1974)
7. Insurance Center's Suggested Conclusions of Law (April 12, 1974)
8. Reliance's Motion for New Trial (May 20, 1974)
9. Insurance Center's Motion for New Trial (May, 1974)

10. Reliance's initial Brief with the Court of Appeals (April, 1975)
11. Insurance Center's initial Brief with the Court of Appeals (April, 1975)
12. DeBoer's Responsive Brief in the Court of Appeals (July, 1975)
13. Reliance's Reply Brief in the Court of Appeals (September, 1975)
14. Insurance Center's Reply Brief in the Court of Appeals (October, 1975)
15. Argument of Appeal (November 18, 1975); and
16. Reliance's Petition for Rehearing (September, 1976)[1]

Reliance could have asked the trial court or the Court of Appeals to certify any unresolved questions of Oklahoma law to the Oklahoma Supreme Court at any point during the over three year period noted above, but chose not to do so.

---

1. By contrast, note the conduct of the party seeking certification as discussed by Mr. Justice Rehnquist in his concurring opinion in *Lehman Bros.* v. *Schein*, 416 U.S. 386 (1974).

CONCLUSION

Reliance has failed at every possible opportunity to request certification of questions of law to the Oklahoma Supreme Court. It does so now only as a last-ditch effort to further extend this litigation when it seems obvious to it that it will not obtain the result it desires from the federal judiciary. For the reasons set out herein and in the prior Brief filed by DeBoer herein, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

LAWRENCE E. CURFMAN
JOHN R. STALLINGS
BRIAN G. GRACE, of
CURFMAN, BRAINERD, HARRIS, BELL,
WEIGAND & DEPEW
830 First National Bank Building
Wichita, Kansas 67202
(316) 263-9111

WILLIAM J. ROSS, of
RAINEY, WALLACE, ROSS & COOPER
735 First National Center
Oklahoma City, Oklahoma 73102
(405) 235-1356

Attorneys for Respondent, DeBoer Construction, Inc.